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Supreme Court, U.S.

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IN THE

# Supreme Court of the United States

MAJOR MAURICE ANDERSON,

*Petitioner,*

v.

DAVID RUSSELL,

*Respondent.*

**On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals, entering judgment for defendant as a matter of law, erroneously relied on testimony the jury was not required to believe, in violation of this Court's decision in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).

2. Whether the Court of Appeals set aside the jury's finding that defendant used excessive force and entered judgment as a matter of law for defendant based on the court's own assessment of the credibility of witnesses and weight of the evidence in violation of the Seventh Amendment.

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Henderson, Edith Guild, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966) ..... 10

Holmes, Oliver Wendell, COLLECTED LEGAL PAPERS (1920). ..... 10

Schnapper, Eric, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237 ... 11

Story, Joseph, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) (R. Rotunda & J. Nowak eds. 1987) ..... 10

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## PETITION FOR A WRIT OF CERTIORARI

Major Maurice Anderson petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## CITATION OF OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 247 F.3d 125. The opinion of the district court (App., *infra*, 15a-26a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury

shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 1983

Sec. 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

## STATEMENT OF THE CASE

Major Maurice Anderson, asserting federal question jurisdiction under 28 U.S.C. § 1331, brought this civil suit pursuant to 42 U.S.C.A. § 1983 against Officer David Russell, claiming that Russell used excessive force incident to Anderson's seizure, in violation of his Fourth Amendment rights. Anderson also asserted claims under various state laws. (App. 3a) With respect to the § 1983 excessive force claim, the parties stipulated that Russell was acting in his capacity as a police officer at the time of the incident. (App. 3a)

A jury trial was conducted in the United States District Court for the District of Maryland before District Judge Deborah K. Chasanow. The jury returned a verdict in favor of plaintiff Anderson, specifically finding that defendant Russell had used excessive force against Anderson and that Russell was not entitled to

qualified immunity. (App. 5a) The jury awarded damages in the amount of $36,475. (J.A. 572)[1]

Following the jury verdict, Russell renewed his motion for judgment as a matter of law as to the § 1983 claim pursuant to Federal Rule of Civil Procedure 50(b). (App. 5a) With respect to the excessive force issue, the district court stated, "the evidence is much, much too conflicting on whether, in fact, the circumstances presented as a matter of law made the use of force constitutional." (App. 6a)

With respect to the qualified immunity issue, however, the district court found as a matter of law that Russell was entitled to qualified immunity. The court therefore granted defendant's motion for judgment as a matter of law. (App. 6a)

The Court of Appeals for the Fourth Circuit affirmed the judgment for Russell on different reasoning than that of the District Court. The appeals court concluded that there was no substantial evidence that Officer Russell acted unreasonably in shooting Anderson so that the issue of excessive force should not have been submitted to the jury. (App. 6a & 14a) Holding that Russell was entitled to judgment as a matter of law on that basis, the court did not address the issue of qualified immunity. (App. 6a n.7)

**Statement of Facts**

At about 4:30 in the afternoon of December 28, 1991, Major Anderson entered the Prince George's Plaza mall in Hyattsville, Md. He purchased a bottle of wine at a store in the mall, which he proceeded to drink

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1 "J.A." references are to the Joint Appendix filed by the parties in the Court of Appeals for the Fourth Circuit.

as he walked around the mall. (App. 3a) He was wearing a black jacket, which was open, a gray sweater over three shirts, black pants and a hat. He also carried a "Walkman" radio in his back left pocket, and he was listening to the radio with headphones. (App. 3a-4a) Anderson had been drinking wine earlier in the day and admitted that he was intoxicated at the time of the incident. (App. 3a)

On that date, David Russell, a Prince George's County police officer was working part-time as a mall security guard at Prince George's Plaza, along with David Pearson, another Prince George's County police officer. (App. 3a) Both were in dressed in full police uniform. (J.A. 166 & 210) Officer Russell carried two radios, one issued by mall security and the other by Prince George's County Police. (J.A. 168)

Russell testified that at approximately 6:00 p.m., a man approached Russell and told him that a man in the mall appeared to have a gun under his sweater, pointing to Anderson. (App. 4a) Russell spent the next twenty minutes observing Anderson and following him around the mall at a distance of about 30 feet or more. (App. 4a, J.A. 235)[2] Russell testified that he saw a bulge under Anderson's clothing on his left side near his waist band that he believed was consistent with the shape of a handgun. (App. 4a) He did not observe any criminal or dangerous conduct by Anderson. (J.A. 173) At one point, he observed Anderson approach Officer

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2 In his testimony and in the police department Discharge of Firearms Report which Officer Russell prepared shortly after the shooting, Russell placed the time of the shooting at about 7:20 p.m. (J.A. 169, 565). Consequently, the amount of time Russell was able to observe Anderson may have been considerably longer than 20 minutes.

Pearson and attempt to engage him in conversation. (J.A. 173)

Russell informed Pearson of his suspicions and decided to confront Anderson. When Anderson exited through the glass doors of the mall, the officers followed him outside. (App. 4a) They approached Anderson, with weapons drawn, as he was leaning against a wall counting some money. Officer Russell ordered him to drop the money, raise his hands, and get down on his knees. (J.A. 214-15)

Anderson initially complied. After a short time, however, Anderson lowered his hands and attempted to reach his Walkman radio to turn it off. (App. 4a) Believing Anderson was reaching for a weapon, Russell shot Anderson three times. Anderson sustained permanent injuries to his left arm, left thigh, left tibia, and left fibula. A search revealed that Anderson was unarmed. In addition to the Walkman radio, the search found a shoe polish container inside an eye-glasses case on his left side by his belt. (App. 4a)

**Testimony in the District Court**

Anderson filed this case in the Circuit Court for Prince George's County. After removal to the United States District Court for the District of Maryland, the case was tried before a jury.

Officer Russell testified concerning the statement by an unidentified man that Anderson might have a gun. He stated that he did not feel there was time to ask the informant's identity or seek further details. (J.A. 172) He testified that Anderson was not wearing a jacket inside the mall (J.A. 174), but was wearing "a very tight, form fitting, either a sweater or tight T-

shirt." (J.A. 212) He testified that he did not see Anderson's headphones and could not recall whether Anderson was wearing a hat. (J.A. 174 & 222) He did not alert mall security or Prince George's County Police of the situation.

Outside the mall, Russell testified, he stood next to a pillar in front of Anderson, while Officer Pearson was a short distance to Russell's right, using another pillar as a shield. (J.A. 183) He testified that Anderson did not fully comply with his orders to keep his hands raised:

> When I told him to drop the money, he dropped the money. When I told him to raise his hand, he raised it and then after that his compliance started to diminish. It was like he was playing games with me.

(J. A. at 245)

> I wanted him to keep his hands in the air and he kept lowering his hands down. Told him to keep his hands in the air, . . . He didn't comply with that. It was like a game to him, that is what I felt like, that he wasn't taking me seriously at all.

(J. A. at 217)

Russell testified that he saw Anderson make a rapid movement with his left hand toward his waist, and that he shot Anderson because he believed Anderson was reaching for a weapon. (J.A. 185)

Officer David Pearson stated in deposition testimony that Anderson was wearing a jacket in the mall and that Anderson had approached him and attempted to engage him in conversation. (J.A. 485) Pearson testified that he did not observe a bulge in the

area of Anderson's waist. (J.A. 490) At the time of the shooting, he observed that Anderson's hands were moving about and his right hand was below shoulder level, but his view was obstructed by Anderson's jacket. (J.A. 504) He did not see a sudden action by Anderson at the time of the shooting. (J.A. 504)

Larry Williams, a medical technician at nearly Washington Hospital Center, was on his lunch break at the mall and witnessed the incident. (J.A. 144) He testified that he noticed Anderson was wearing headphones. (J.A. 145) From his vantage point inside the mall, looking out through the glass doors, Williams stated, he saw Anderson raise his hands in response to the officer's orders. At one point, he saw Anderson's hands "come down slowly." (J.A. 146) He testified that at the time of the shooting Anderson's hands were "around head level." (J.A. 152) Williams acknowledged that some details of his testimony appeared inconsistent with his statement to a police interviewer following the incident. He explained that this was partially due to his "negative experience" with the interviewer who, he felt, was disputing what Williams saw. (J.A. 159-60)

**The Decision By the Fourth Circuit**

The Fourth Circuit Court of Appeals affirmed, though on a different ground. The court held that, as a matter of law, Russell acted reasonably in using deadly force against Anderson. (App. 3a) Reviewing de novo the district court's denial of Russell's motion for judgment as a matter of law, the court concluded that "substantial evidence does not support the jury's finding of excessive force." (App. 14a)

Applying the objective standard of "whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force" (App. 7a), the court stated that "the evidence conclusively establishes that Russell reasonably perceived Anderson to be armed with a gun." (App. 8a)

The evidence relied on by the court consisted of Russell's testimony regarding the anonymous tip, "later corroborated by Russell's own observation of a bulge near Anderson's waistband." (App. 8a) The court stated that Officer Pearson's testimony that he did not perceive a bulge under Anderson's clothing "in no way contradicts or otherwise affects the issue of whether Russell perceived a bulge." (App. 8a n.9) "Once Russell perceived a bulge consistent with the shape of a gun," the court stated, "he was justified in believing that Anderson was armed and dangerous." (App. 9a)

The court further stated that the evidence "establishes that immediately before Russell fired, Anderson was reaching toward what Russell believed to be a gun." (App. 10a) Again, the court relied largely on the testimony of Russell. The court rejected the testimony of Larry Williams, an eyewitness to the incident, who testified Anderson was lowering his hands slowly, and his hands "were still around head level when he was shot." (App. 9a) The court noted that Williams was twenty to thirty feet away from Anderson, watching the incident from inside the mall, where his view was partially obstruced, while the Officer Russell was only about ten feet away. (App. 9a-10a) The court stated that the discrepancies between Williams' eyewitness testimony and the officers' testimony "do not raise an issue of triable fact." (App. 10a)

The court emphasized that in reviewing the circumstances surrounding the shooting, the court made "allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving." quoting *Graham v. Connor*, 490 U.S. 386, 396 & 397 (1989). (App. 10a) Viewing the evidence in that light, the court concluded that "Russell's split-second decision to use deadly force against Anderson was reasonable in light of Russell's well-founded, though mistaken, belief that Anderson was reaching for a handgun." (App. 14a)

## REASONS FOR GRANTING THE WRIT

### I. This Court Should Carefully Review Judgments As A Matter Of Law Entered By The Courts Of Appeals Which Usurp The Constitutional Role Of The Civil Jury As Finders Of Fact.

This case presents this Court with an issue of extraordinary importance to civil litigants in federal courts: Preserving the right to trial by jury against federal courts that substitute their own factual findings for those of the jury.

The founding generation of Americans valued the jury both as a shield against oppression by government and as a means by which ordinary citizens participate in democratic government. "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 344

(1979) (Rehnquist, J., dissenting), quoting Oliver Wendell Holmes, COLLECTED LEGAL PAPERS 237 (1920).

The right to trial by jury in civil cases was so important that its omission nearly led to the rejection of the proposed Constitution. Joseph. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (1833) (R. Rotunda & J. Nowak eds. 1987). Opponents were particularly concerned that federal appellate judges would render the right meaningless by retrying the facts on appeal. They pointed to the grant of appellate jurisdiction to the Supreme Court in Art. III §2, cl. 3 over issues of fact and law, as the "virtual abolition of the civil jury." Edith Guild Henderson, *The Background of the Seventh Amendment,* 80 Harv. L. Rev. 289, 295 (1966).

The Constitution was ratified only upon agreement that a Bill of Rights including the right to trial by jury would be added. The drafters were so determined to prevent federal judges from undoing the jury's work that they included an express prohibition against judicial re-examination of facts tried by a jury.[3] *Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415, 450-51 (1996) (Scalia, J., dissenting). Indeed, Justice Story pronounced the Re-examination Clause of the Seventh Amendment the "more important" clause. *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 447 (1830).

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[3] The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. CONST., amend. vii.

This Court has repeatedly emphasized the importance of protecting the jury's constitutional role against overreaching by federal judges.

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

*Dimick v. Schiedt*, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 , 564 (1990). *See also Jacob v. New York City*, 315 U.S. 752, 752-53 (1942) ("The right of jury trial in civil cases at common law is a . . . right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts.").

Indeed, this Court has been steadfast in preserving the vital role of the jury against incursions by the lower courts.

> During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the seventh amendment right to trial by jury in civil cases. Prior to 1968 the Court regularly granted review in several cases each year to consider the sufficiency of the evidence to support a disputed jury verdict, and in the overwhelming majority of the more recent cases did so to reinstate a jury verdict that had been overturned by an appellate court.

Eric Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237.

Judgments as a matter of law authorized by Rule 50 warrant particular scrutiny by this Court. This power to take a case away from the jury was not

exercised by common-law courts. *Gasperini, supra,* at 436 n.20.

The potential for judicial overreaching makes review by this Court all the more important. As Justice Black cautioned with respect to directed verdicts:

> A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issues in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

*Galloway v. United States,* 319 U.S. 372, 407 (1943) (Black, J., dissenting).

Historically, this Court exercised such vigilance. From 1938 to 1968, the Court granted certiorari in 25 cases in which federal courts of appeals had overturned jury verdicts for insufficient evidence. The Court ordered reinstatement of the verdicts in 24 of the cases. Schnapper, *supra,* at 241.

In *Neely v. Martin K. Eby Const. Co.,* 386 U.S 317 (1967), this Court found no impediment under Fed. R. Civ. Pro. 50(d) to entry of judgment n.o.v. by the federal appellate courts "in appropriate cases." *Id.* at 324. In the decades following, however, this Court granted review in relatively few such cases. During that period, there occurred a measurable increase in the number of lower federal court decisions overturning jury verdicts on the basis of sufficiency of evidence, few of which even referred to the Seventh Amendment. Schnapper, *supra* at 246-253. In the absence of strong

guidance from this Court during that period, appellate courts applied to themselves more relaxed standards, fueling a trend toward increasingly aggressive review of jury verdicts by federal appeals courts. *See* Charles A. Wright, Arthur R. Miller, Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2522 (1995); Steven Alan Childress, *A 1995 Primer On Standards Of Review In Federal Civil Appeals*, 161 F.R.D. 123, 133 (1995).

In recent years this Court has renewed its efforts to safeguard the constitutional function of the jury as the finder of fact in civil cases. *See, e.g., Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415 (1996); *Hetzel v. Prince William County*, 523 U.S. 208 (1998); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

Most recently, in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), this Court set forth the limits of the federal courts' authority to set aside a jury's verdict and enter judgment as a matter of law under Fed. R. Civ. Pro. 50(d).

The Fourth Circuit in this case failed to abide by the limits set forth in *Reeves* and earlier decisions of this Court, violating Petitioner's Seventh Amendment rights and presenting this Court with an issue of great importance.

**II. In Entering Judgment As A Matter of Law, the Court Below Impermissibly Relied Upon Evidence That the Jury Was Not Required to Believe.**

This Court, in *Reeves*, resolved an issue that had given rise to some divergence among the court of appeals. The Court held that in entertaining a motion for judgment as a matter of law under Fed. Rule Civ. Pro. 50 , federal courts are not limited to review of

evidence favorable to the nonmovant, but may look at all the evidence. At the same time, consistent with the rationale of the rule and the rights of the verdict winner, the Court imposed clear limits on the evidence a court may rely upon in entering judgment as a matter of law:

> [A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

530 U.S. at 151 (citations and internal quotations omitted).

The Fourth Circuit below violated those limits in this case.

In overturning the jury's verdict and determining that no rational jury could find Officer Russell's use of deadly force excessive, the court relied most heavily on the testimony of Officer Russell himself. The jurors, of course, were entitled to believe Russell's testimony that he received an anonymous tip that Anderson might have a gun, that he observed a bulge in Anderson's sweater resembling a handgun, and that at the time of the shooting he believed Anderson was reaching for a weapon. But they were not obliged to do so.

As the party defendant, of course, Officer Russell was not a disinterested witness.

Moreover, the jury had reason to doubt Officer Russell's powers of observation and recall. He testified,

contrary to other witnesses, that Anderson was not wearing a jacket in the mall. Russell did not recall whether Anderson was wearing a hat. He testified that during the entire evening he did not see Anderson's Walkman radio or headphones, although Larry Williams testified that the headphones and cord were plainly visible.

The jury was not obliged to credit Russell's testimony on the two crucial issues identified by the court. Officer Pearson, who had ample opportunity to observe Anderson and at one point was close enough to speak to him, testified that he did not observe a bulge in Anderson's sweater. The testimony of Larry Williams, whose vantage point allowed him to observe the incident, contradicted Russell's statement that Anderson made a rapid movement toward his waistband.

In short, the court of appeals relied on Russell's testimony, which the jury was not required to accept, in violation of the limits of its authority under Fed. R. Civ. Pro. 50, which this Court set forth in *Reeves*.

**III. The Court Below Entered Judgment As A Matter of Law Based On Its Own Views of the Credibility of Witnesses and the Weight of the Evidence, and Its Own Inferences From the Facts, In Violation of Its Authority Under Rule 50 and the Seventh Amendment.**

The purpose of the Seventh Amendment is to preserve "the common law distinction between the province of the court and that of the jury, whereby . . . issues of law are resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

This Court has repeatedly admonished lower courts as to the boundaries of their authority.

> It is the jury, not the court, which is the factfinding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. . . Its function is to select among conflicting inferences and conclusions that which it considers most reasonable.

*Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.").

This Court in *Reeves* made clear that these limits on the scope of the court's authority are equally applicable when deciding motions for judgment as a matter of law under Fed. R. Civ. Pro. 50:

> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.

530 U.S. at 150.

In *Reeves* , this Court reversed the decision of the Fifth Circuit which transgressed those limits. The Fourth Circuit's decision in this case presents an even more egregious usurpation of the constitutional role of the jury.

*a. The Lower Court Below Based Its Decision on Its Own View of the Credibility of Witnesses and the Weight of Evidence.*

As described above, the lower court based its conclusion that Officer Russell's use of deadly force was reasonable as a matter of law almost entirely on Russell's own testimony on two crucial points: that he saw a bulge under Anderson's sweater resembling a gun and that he shot Anderson because Anderson appeared to be reaching for the the supposed weapon.

On the first point, the court not only credited Russell's testimony, but it also gave considerable weight to the statement of the anonymous tipster that Anderson appeared to have a gun under his sweater. The court treated this statement as important corroboration of Russell's testimony. (App. 8a) A reasonable jury, however, could well decide to accord little weight to the out-of-court statement by a man whose identity, motives, powers of observation, and basis for making the statement were all unknown.

At the same time, the court accorded no weight to the sworn testimony of Officer Pearson, who observed Anderson for a substantial length of time and at one point was close enough to talk to him, that he did not observe such a bulge. The court stated that the fact that Pearson did not see a bulge "had no bearing" on whether Russell observed one. (App. 8a n.9) The weight of Pearson's testimony was properly for the jury.

On the second point, Russell stated that Anderson made a rapid movement in the direction of the supposed gun. Eyewitness Larry Williams testified, however, that Anderson was lowering his hands slowly and that they were about shoulder level when

he was shot. (App. 9a) The court of appeals found Williams' testimony wholly lacking in credibility because he was standing farther from the scene than Russell and had a poorer view of Anderson. Whether these factors destroyed Williams' credibility as an eyewitness was for the jury to determine.

*b. The Lower Court Substituted Its Own Inferences From the Facts of the Case in Place of those Legitimately Drawn By the Jury*

In finding as a matter of law that Officer Russell's use of deadly force was reasonable under the circumstances, the lower court emphasized that it made "allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving." (App. 10a)

The jury, however, was entitled to draw different inferences from the facts in evidence. The jury was presented with evidence that, when Officer Russell's attention was drawn to Anderson, he made no attempt to obtain any additional, potentially important information from the anonymous tipster or from anyone else at the mall. His immediate course of action was simply to observe and follow Anderson as he walked around the mall. Although he was carrying two radios, one issued by mall security and the other by the Prince George's County police department, Russell did not feel it necessary to alert either mall security or the police of the situation, even when the officers decided to confront Anderson. In sum, the jury could view Russell's actions as inconsistent with his subsequent testimony that he believed Anderson was armed and dangerous.

The jury could also find that outside the mall Russell was not faced with the kind of tense, uncertain and rapidly-evolving situation that required him to make a split-second decision, as the lower court inferred. Indeed, the jury could find that Russell was in substantial control of the circumstances. He chose the time and place for the confrontation and the manner in which he approached Anderson. When Anderson was raising and lowering his hands, Russell did not order Anderson to place his hands against the wall to keep them in plain sight. Nor did he take advantage of the protection of the pillar next to him.

The court stated that the jury may not second-guess what the officer should have done based on the luxury of hindsight. However, the jury was entitled to infer from these circumstances that Russell's actions were not those of a reasonable officer in immediate fear for his safety or the safety of others.

The jury was also presented with Russell's own testimony concerning his state of mind at the time of the shooting. Twice during examination by his own attorney, Russell indicated frustration that Anderson was not fully complying with his orders. "It was like he was playing games with me," he testified. (J.A. 245) "It was like a game to him, that is what I felt like, that he wasn't taking me seriously at all." (J.A. 217)

Even accepting Russell's claim that he did not notice that Anderson was intoxicated and that he was listening to his radio through earphones, the jury could have inferred that the officer acted on the basis of emotion, out of frustration or the belief that Anderson was taunting him.

Whether such an explanation of the tragic events was closer to the truth was a matter for the jury to

decide. "[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official. And that is as it should be." *Saucier v. Katz*, No. 99-1977 (June 18, 2001) (Ginsberg, J., concurring). It certainly should not be decided by an appellate court looking only at the paper record.

In view of the lower court's intrusion on the constitutional role of the jury in this case, this Court should grant review to halt "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 339 (1979) (Rehnquist, J., dissenting), quoting Justice Black in *Galloway , supra*, 319 U.S. at 397.

## CONCLUSION

For the forgoing reasons, Petitioner Major Maurice Anderson requests this Honorable Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Jeffrey R. White
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Litigation, P.C.
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*Counsel of Record*

June 27, 2001

**APPENDIX A**

**PUBLISHED**

**United States Court of Appeals**
**For The Fourth Circuit.**

Major Maurice ANDERSON,
*Plaintiff-Appellant,*

v.

David RUSSELL,
*Defendant-Appellee,*

and

John Doe, Officer; David Mitchell, Chief of Police; Prince George's County, Maryland, a Municipal Corporation; Equity Property Management Corporation; IPC International Corporation; David Pearson; First Property Management Corporation,
*Defendants.*

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Major Maurice ANDERSON, Plaintiff-Appellee,

v.

David RUSSELL,
*Defendant-Appellant,*

and

John Doe, Officer; David Mitchell, Chief of Police; Prince George's County, Maryland, a Municipal Corporation; Equity Property Management Corporation; IPC International Corporation; David Pearson; First Property Management Corporation,
*Defendants.*

Nos. 00-1406, 00-1430.

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Deborah K. Chasenow, District Judge

Argued Jan. 24, 2001.

Decided March 29, 2001.

Before WILKINSON, Chief Judge, and WIDENER and WILLIAMS, Circuit Judges.

Affirmed by published opinion. Judge Williams wrote the opinion, in which Chief Judge Wilkinson and Judge Widener joined.

## COUNSEL

**ARGUED:** Douglas Alan Datt, Gavett & Datt, P.C., Rockville, MD, for Appellant. Jay Heyward Creech, Upper Marlboro, MD, for Appellee. **ON BRIEF:** Rhoda S. Barish, Gavett & Datt, P.C., Rockville, MD, for Appellant. Sean D. Wallace, Upper Marlboro, MD, for Appellee.

## OPINION

WILLIAMS, Circuit Judge:

Major Maurice Anderson brought suit against Officer David Russell,[1] claiming violations of 42

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[1] Anderson also included as defendants Officer David Pearson, Prince George's County and its police chief, a security services company, and a mall management company. The district court granted the request of Prince George's County and its police chief

U.S.C.A. § 1983 and various state laws arising from the alleged use of excessive force incident to Anderson's seizure. Following a jury verdict in favor of Anderson as to his § 1983 claim, the district court granted Russell's motion for judgment as a matter of law with respect to Russell's qualified immunity defense, but it denied his motion with respect to the jury's finding of excessive force. We conclude that Officer Russell acted reasonably in using deadly force to protect himself against a perceived immediate and deadly threat posed by Anderson. Accordingly, we affirm the entry of judgment in favor of Russell, but on different reasoning than that of the district court.

## I.

### A.

Russell is a Prince George's County police officer. On December 28, 1991, Russell was providing part time security services at Prince George's Plaza mall, along with Officer David Pearson.[2]

Anderson arrived at the mall at approximately 4:30 in the evening. He had been drinking wine during the day and purchased another bottle of wine at a store in the mall, which he drank while walking around the mall.[3] Anderson was wearing a black jacket, which was open. Underneath, he wore three shirts and a sweater.

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for bifurcated trials as to Anderson's municipal liability claim against them, and the parties later agreed to dismiss the municipal liability claim. The district court granted summary judgment on all claims for the remaining defendants, except with respect to Officer Russell.

[2] The parties stipulated that Russell was acting in his capacity as a police officer at the time of the incident.

[3] Anderson admitted to being intoxicated that evening.

Inside of the shirts, Anderson had tucked a shoe polish container inside an eye-glasses case on his left side by his belt. Anderson also was carrying a portable Walkman radio in his back pocket and was listening to the radio with earphones, which were covered by a hat.

Russell testified that at approximately 6:00 p.m., a mall patron approached Russell and informed him that a man appeared to have a gun under his sweater, pointing to Anderson. Russell spent the next twenty minutes observing Anderson and saw a bulge under Anderson's clothing on his left side near his waist band that Russell believed to be consistent with a handgun, corroborating the citizen's report.

Russell decided to confront Anderson to attempt to discern whether Anderson was armed and, if so, what his intentions were. When Anderson exited the mall, Russell and Pearson followed him.[4] Russell and Pearson approached Anderson with their guns drawn and instructed him to raise his hands and get down on his knees. While Anderson initially complied with the order to raise his hands, he later lowered them, without explanation to the officers, in an attempt to reach into his back left pocket to turn off his Walkman radio. Believing Anderson was reaching for the reported weapon, Russell shot Anderson three times. Anderson sustained permanent injuries to his left arm, left thigh, left tibia, and left fibula as a result of the shooting. A later search of Anderson's person and his belongings revealed the presence of the radio and that he was unarmed.

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[4] Russell testified that they planned their approach of Anderson to get him away from the people in the mall and "in a position where other [s] weren't in danger." (J.A. at 214.)

**B.**

Anderson filed this case in the Circuit Court for Prince George's County. After removal of the case to the United States District Court for the District of Maryland, the case was tried before a jury.

Russell moved at the close of Anderson's case and again at the conclusion of the presentation of all evidence for judgment as a matter of law as to all claims.[5] The district court reserved ruling upon the motion and submitted the claims to the jury for consideration.

With respect to the § 1983 excessive force claim, the district court submitted to the jury the questions of whether Russell had used excessive force against Anderson and, if so, whether Russell was entitled to qualified immunity. The jury found in favor of Anderson on both questions.[6]

After return of the jury verdict, Russell renewed his motion for judgment as a matter of law as to the § 1983 claim pursuant to Federal Rule of Civil Procedure 50(b), or in the alternative for a new trial pursuant to Federal Rule of Civil Procedure 59. Russell argued that the district court erred by submitting the questions of excessive force and qualified immunity to the jury because both questions should have been resolved as

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[5] The submitted claims were the § 1983 excessive force claim, assault and battery, false imprisonment, and the availability of punitive damages.

[6] The jury also found that Russell was not liable for false imprisonment and determined that punitive damages should not be awarded. It was unable to reach a unanimous verdict on the assault and battery claim.

matters of law. The district court granted Russell's Rule 50(b) motion as to the qualified immunity issue, but it denied the motion as to the excessive force issue. With respect to the excessive force issue, the district court stated, "the evidence is much, much too conflicting on whether, in fact, the circumstances presented as a matter of law made the use of force constitutional." (J.A. at 577.) With respect to the qualified immunity issue, however, the district court held that because Russell's use of force complied with his training, he was entitled to qualified immunity as a matter of law.

Anderson appeals the district court's qualified immunity ruling, while Russell appeals the district court's excessive force ruling. We hold that, as a matter of law, Russell's use of force did not violate the Fourth Amendment and, therefore, that the § 1983 excessive force claim should not have been submitted to the jury. Accordingly, we affirm the entry of judgment as a matter of law in favor of Russell on Anderson's excessive force claim.[7]

## II.

### A.

We review de novo the grant or denial of a motion for judgment as a matter of law. *See Malone v. Microdyne Corp.*, 26 F.3d 471, 475 (4th Cir. 1994). In

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[7] Because we resolve this appeal on the ground that Russell's use of deadly force did not violate the Fourth Amendment, we need not resolve the issue of whether, and to what extent, the reasonableness inquiry with respect to excessive force and qualified immunity merges. *See Saucier v. Katz*, --- U.S. ----, 121 S. Ct. 480, 148 L.Ed.2d 454 (2000) (granting certiorari on, inter alia, the issue of whether the reasonableness inquiry merges when analyzing qualified immunity in an excessive force claim).

considering a motion for judgment as a matter of law contrary to the jury's findings, we construe the evidence in the light most favorable to the party against whom the motion was made and ask whether "there is substantial evidence in the record to support the jury's findings." *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985).

Claims that law enforcement officers used excessive force when making an arrest "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The standard of review is an objective one. *Id.* at 397, 109 S. Ct. 1865. The question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. *Id.* A police officer may use deadly force when the officer has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985). Moreover, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396, 109 S. Ct. 1865. A reviewing court must make "allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 397, 109 S. Ct. 1865. "The court's focus should be on the circumstances at the moment force was used and on the fact that officers on the beat are not often afforded the luxury of armchair reflection." *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (citations omitted).

**B.**

Anderson argues that it was proper for the jury to resolve the issue of excessive force because reasonable minds could differ as to whether Russell had probable cause to believe that Anderson posed a serious threat to Russell. *See Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985). Given the uncontroverted evidence as to what Russell perceived immediately before firing, we do not believe that there is a legally sufficient evidentiary basis for a rational jury to find for Anderson on the issue of excessive force. Accordingly, we hold that Russell was entitled to judgment as a matter of law on the excessive force claim.

We first note that the evidence conclusively establishes that Russell reasonably perceived Anderson to be armed with a gun. Russell testified that he believed Anderson to be armed based upon a citizen's report that was later corroborated by Russell's own observation of a bulge near Anderson's waistband.[8] No evidence was introduced that refuted Russell's testimony regarding the citizen's report or his perception of the bulge.[9] Moreover, Anderson concedes that he was carrying an eyeglass case stuffed with shoe polish in the same area in which Russell testified to

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[8] Unlike in *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L.Ed.2d 254 (2000), which involved an anonymous telephone tip, the citizen who notified Russell that Anderson appeared armed approached Russell in person.

[9] To attempt to create a factual dispute, Anderson points to Pearson's testimony, in which Pearson states that he did not personally perceive a bulge under Anderson's clothing. Obviously, what Pearson perceived in no way contradicts or otherwise affects the issue of whether Russell perceived a bulge.

observing a bulge. Once Russell perceived a bulge consistent with the shape of a gun, he was justified in believing that Anderson was armed and dangerous. *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 54 L.Ed.2d 331 (1977) ("The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer."). Thus, there is no doubt that Russell reasonably believed Anderson to be armed at the time he approached Anderson.[10]

Upon approaching Anderson, the officers ordered Anderson to put his hands over his head. Russell and Pearson testified, and Anderson concedes, that immediately before Russell fired, Anderson was lowering his hands in the direction of the bulge in disregard of the officers' order. Nevertheless, Anderson argues that a triable issue of fact exists regarding the precise positioning of Anderson's hands and the speed at which he was lowering his hands at the time he was shot.

Larry Williams, who was a witness to the incident, testified that, although Anderson was lowering his hands, he was lowering them slowly, and Anderson's hands "were still around head level when he was shot." (J.A. at 152.) At the time of the incident, Williams was between twenty to thirty feet away from Anderson, whereas the officers were ten feet away. Moreover, Williams was watching the incident from inside the mall and, at the time Anderson was shot, Williams's view of Anderson's hands was obstructed

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[10] We do not address the propriety or the manner of the initial seizure of Anderson because in the proceedings below, Anderson challenged only the use of force during the seizure and did not present a Fourth Amendment challenge to the seizure itself.

by a partition in the door frame through which he was viewing the incident.

To evaluate excessive force, we view the facts from the perspective of the officer. *See Graham v. Connor,* 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989). In a rapidly evolving scenario such as this one, a witness's account of the event will rarely, if ever, coincide perfectly with the officers' perceptions because the witness is typically viewing the event from a different angle than that of the officer. For that reason, minor discrepancies in testimony do not create a material issue of fact in an excessive force claim, particularly when, as here, the witness views the event from a worse vantage point than that of the officers. *See Sigman v. Town of Chapel Hill,* 161 F.3d 782, 788 (4th Cir. 1998) ("Their observations cannot effectively impact the credibility of Officer Riddle's testimony (or that of all five other officers on the scene) as to his perceptions of what he saw from an entirely different - and closer - vantage point."). Thus, the discrepancies between the officers' testimony and Williams's testimony about the positioning and speed at which Anderson was lowering his hands do not raise an issue of triable fact.

The evidence establishes that immediately before Russell fired, Anderson was reaching toward what Russell believed to be a gun. Any reasonable officer in Russell's position would have imminently feared for his safety and the safety of others. This Circuit has consistently held that an officer does not have to wait until a gun is pointed at the officer before the officer is entitled to take action. *See McLenagan v. Karnes,* 27 F.3d 1002, 1007 (4th Cir.1994) (holding that officer was entitled to use deadly force when the officer

had reason to believe the suspect was armed, although the officer could not confirm that the suspect was armed); *Slattery v. Rizzo*, 939 F.2d 213, 215-16 (4th Cir. 1991) (holding that deadly force was appropriate when the suspect failed to comply with the officer's order to raise his hands and the officer reasonably believed the suspect to be coming at him with a weapon, although the "weapon" turned out to be a beer bottle); *cf. Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (affirming the entry of judgment in favor of Officer Ruffin although Ruffin was unable to confirm the nature of the weapon, which turned out to be a wooden nightstick, before using deadly force). We have further held that an officer is not required to see an object in the suspect's hand before using deadly force. *McLenagan*, 27 F.3d at 1007 ("[W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him."); *Sigman*, 161 F.3d at 788 ("Notwithstanding the possibility of a dispute about whether a knife was actually in Sigman's hand at the moment of the shooting, Officer Riddle, and the other officers present, acted on the perception that Sigman had a knife in his hand."). Accordingly, because Russell had sound reason to believe that Anderson was armed, Russell acted reasonably by firing on Anderson as a protective measure before directly observing a deadly weapon.

Anderson next argues that a material factual dispute exists as to the reasonableness of Russell's conduct because Russell failed to utilize available cover behind protective pillars rather than firing upon Anderson. As we stated in *Elliott*, the "suggestion that the officers might have responded differently is exactly the type of judicial second look that the case law

prohibits." *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996). Accordingly, we decline to adopt 20/20 hindsight to second guess Russell's decision to shoot rather than take cover, given that Russell reasonably believed his life to be in imminent danger.

Finally, Anderson argues that Russell's decision to shoot was unreasonable given the minor nature of the suspected criminal activity at issue. *See Graham*, 490 U.S. at 393, 109 S. Ct. 1865 (establishing that the severity of the crime at issue is one factor to evaluate when analyzing whether an officer's conduct was reasonable in an excessive force claim). Anderson argues that at the time Russell approached Anderson, Russell suspected Anderson only of a possible violation of Maryland's concealed weapons law, which is a misdemeanor violation. *See* Md. Ann. Code Art. 27, § 36B (1991). Initially, we note that Anderson misunderstands the nature of Russell's suspicion at the time Russell approached Anderson. Russell approached Anderson not simply to determine whether Anderson was violating Maryland's concealed weapons law; rather Russell sought to determine whether Anderson intended to use the concealed weapon in a way that would put himself, the mall patrons, or other citizens in jeopardy. Thus, Russell's approach was motivated not only by his concern that Anderson was violating Maryland's concealed weapons law, but also by his concern of the possibility of very serious impending criminal activity.

Assuming, however, that the suspected criminal activity at issue was relatively minor, that factor would prove irrelevant to our excessive force analysis because our focus is on the circumstances as they existed at the moment force was used. *See Elliott*, 99 F.3d at 642;

*Greenidge*, 927 F.2d at 791-92 ("In light of . . . the Supreme Court's focus on the *very moment* when the officer makes the 'split-second judgments,' . . . events which occurred before Officer Ruffin opened the car door and identified herself to the passengers are not probative of the reasonableness of Ruffin's decision to fire the shot.") (emphasis added) (citing *Graham*, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443). At the precise moment that Russell used deadly force, he reasonably believed that Anderson posed a deadly threat to himself and others, making the nature of the suspected criminal activity at issue at the time Russell approached Anderson irrelevant.

Russell ultimately was mistaken as to the nature and extent of the threat posed by Anderson, which resulted in a tragic consequence to Anderson. Nevertheless, as we stated in *Elliott*, "the Fourth Amendment does not require omniscience. . . . Officers need not be absolutely sure . . . of the nature of the threat or the suspect's intent to cause them harm - the Constitution does not require that certitude precede the act of self protection." *Elliott*, 99 F.3d at 644; *see also Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) ("Also irrelevant is the fact that Crawford was actually unarmed. Anderson did not and could not have known this. The sad truth is that Crawford's actions alone could cause a reasonable officer to fear imminent and serious physical harm."). Anderson's actions unwittingly caused Russell to reasonably fear imminent and serious physical harm. Accordingly, we do not believe there is sufficient evidence to support the jury's finding with respect to excessive force. Therefore, Russell is entitled to the entry of judgment as a matter of law as to Anderson's excessive force claim.

## III.

Russell's split-second decision to use deadly force against Anderson was reasonable in light of Russell's well-founded, though mistaken, belief that Anderson was reaching for a handgun. Thus, Russell's use of force does not constitute a Fourth Amendment violation. Of course, it is extremely unfortunate that Anderson was seriously injured; however, "§ 1983 does not purport to redress injuries resulting from reasonable mistakes." *McLenagan v. Karnes,* 27 F.3d 1002, 1008 (4th Cir.1994). Because substantial evidence does not support the jury's finding of excessive force, we affirm the district court's entry of judgment as a matter of law in favor of Russell.

*AFFIRMED*

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAURICE ANDERSON, :

Plaintiff, :

v. Civil Action No. DCK 93-363

DAVID RUSSELL, et al., :

Defendants. :

**MEMORANDUM OPINION**

Plaintiff, Major Maurice Anderson, filed this case in Circuit Court for Prince George's County against Prince George's County, Police Chief David Mitchell, and Officer David Russell, alleging a constitutional violation pursuant to 42 U.S.C. § 1983, and various state law claims. The Defendants removed to this court, and this court subsequently granted Defendants' request for bifurcation and ordered a stay of discovery pertaining to Police Chief Mitchell and the County. the purpose of the bifurcation was to defer the issue of municipal liability pursuant to Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), pending resolution of the claims against the individual officer, David Russell.

The case against Officer Russell was tried before a jury in this court from August 6-8, 1996. Both at the close of Plaintiff's case and at the conclusion of the

presentation of all evidence, Defendant Russell moved for judgment as to all claims, contending that there was insufficient evidence upon which the jury could base a verdict in favor of the Plaintiff. The court reserved ruling upon the § 1983 claim, assault and battery, false imprisonment, and the potential for an award of punitive damages, and sent them to the jury for consideration.

The jury returned a verdict in favor of the Plaintiff as to the § 1983 excessive force claim, was unable to reach a unanimous verdict on assault and battery but found that the Defendant did not act maliciously, found against the Plaintiff on false imprisonment, and determined that punitive damages should not be awarded. This verdict and the jury's award of damages was entered by this court on August 13, 1996.

Presently pending before the court is Defendant Russell's renewed motion for judgment pursuant to Federal Rule of Civil Procedure 50 on the ground that Officer Russell is entitled to qualified immunity as a matter of law, or in the alternative for a new trial pursuant to Federal Rule of Civil Procedure 59. Also pending is Plaintiff's motion for attorneys' fees. A hearing was held on November 4, 1996, and the court is now prepared to issue a ruling. For the reasons that follow, the court finds that Officer Russell is entitled to qualified immunity, and judgment shall be entered in his favor. His alternative motion for a new trial will be denied. Because of this ruling on the motion for judgment, Plaintiff is not at this point a prevailing party, and his motion for attorneys' fees consequently will be denied.

## I. BACKGROUND

Officer David Russell is a Prince George's County Police Officer. On December 28, 1991, Officer Russell was providing part-time security services at Prince George's County Plaza mall, along with Officer David Pearson, also a Prince George's County Police Officer. The parties stipulated that Officer Russell was acting in his capacity as a police officer on this day.

Plaintiff Maurice Anderson arrived at the mall at approximately 4:30 p.m. He purchased some wine from a store at the mall and proceeded to drink it. Plaintiff admitted to being intoxicated on the night in question. Plaintiff was wearing black pants, a black sweater, a black windbreaker, and a black cap. Plaintiff was also wearing a "Walkman" radio with earphones on his head, with the radio on. At around 6:00 p.m., Officer Russell received a complaint from a citizen that Plaintiff may be armed with a gun. Officer Russell then observed Plaintiff for about 20 minutes and observed a bulge under Plaintiff's sweater that Russell believed to be consistent with a handgun.

Officer Russell then contacted Officer Pearson, and the two of them approached Plaintiff after he exited the mall. Both officers had their guns drawn, and Plaintiff was ordered to place his hands up and get to his knees. While Plaintiff initially complied with the orders to raise his hands, he later lowered them again. Plaintiff reached inside the left portion of his jacket, apparently to turn off his radio. Officer Russell apparently believed that Plaintiff was reaching for the reported handgun, and shot Plaintiff three times. As it turns out, Plaintiff did not have a gun.

At trial, Officer Russell testified that based on the citizen report and the bulge under Plaintiff's

sweater, he believed that Plaintiff was armed with a gun. Officer Russell further testified that when Plaintiff reached toward the bulge, he believed that Plaintiff was reaching for his weapon. Officer Russell testified that he acted in conformity with the training he received from the police department, namely, that he was authorized to use deadly force when he felt that his life or the lives of others were in danger, and that it was not necessary actually to see a weapon prior to employing deadly force.

Rodney Chaney, the Director of Judgmental Training at the Prince George's County Police Academy since 1987, testified as an expert for the Defendant, and offered the opinion that the force used by Officer Russell was reasonable under the circumstances. Mr. Chaney also testified at length about the "shoot/no-shoot" training seminar, which Officer Russell had been through approximately four or five times prior to the December 28, 1991 incident in this case. Through the "shoot/no-shoot" training, police officers are taught how to react in various scenarios - when it is appropriate to shoot and when it is not. Mr. Chaney testified that for several years prior to 1991, and continuing to the present, Prince George's County police officers were taught that, due to lags in reaction time, police officers do not have to wait until they actually see a weapon before employing deadly force. Mr. Chaney also testified that, as of 1991, he knew of no major police department that taught their officers that it was necessary to wait.

Robert W. Klotz was called as an expert by the Plaintiff, and he offered the opinion that the force used in this case was excessive.

The jury found that Officer Russell did use excessive force against Plaintiff in violation of Plaintiff's Fourth Amendment rights, thereby entitling Plaintiff to damages pursuant to § 1983. As mentioned above, the jury either was unable to agree or found for the Defendant on the other claims submitted for its consideration. Therefore, the only issue necessary to resolve at this point is whether Officer Russell is entitled to qualified immunity, and thus not liable to Plaintiff for damages under § 1983, notwithstanding the fact that the jury found that Officer Russell used excessive force in violation of the Fourth Amendment.

## II. DISCUSSION

### A. STANDARD OF REVIEW

Rule 50(a) of the Federal Rules of Civil Procedure permits the court to rule on an issue when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. . . ." As discussed above, Defendants moved for judgment at the close of Plaintiff's case. Rule 50(b), however, allows the court to reserve the decision on the motion until after the case has been submitted to the jury and the jurors have reached a verdict or are unable to agree, as the court did in this case. Rule 50(b) permits a party to renew its motion for judgment as a matter of law at the conclusion of trial, and Defendant has done so. If, upon renewal of the motion, the court decides that the initial motion for judgment as a matter of law should have been granted, it may set aside the verdict of the jury and enter judgment. Thus, Rule 50 gives the court a last chance to order the judgment that the law requires. 9A Wright & Miller, Federal Practice and Procedure § 2521, pp. 241-42 (1995).

The standard for granting a Rule 50 motion is the same as for a summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "The movant is not entitled to prevail if, based on the applicable law, the evidence presented at trial raises questions upon which reasonable minds may differ." *In re Lone Star Industries, Inc. Concrete Railroad Ties Litigation*, 882 F. Supp. 482, 495 (citing *Harner v. John McShain, Inc.*, 394 F.2d 480, 481 (4th Cir. 1968)). The rule allows, however, the court to take away from the jury's consideration cases or issues when the facts are sufficiently clear that the law requires a particular result. 9A Wright & Miller, § 2521, at p. 240.

Pursuant to Rule 50(b), a motion for a new trial under Rule 59 may be joined with a renewed motion for judgment as a matter of law, which Defendant Russell has done. If a court grants the renewed motion for judgment, it must rule conditionally on the alternative new trial motion. Fed. R. Civ. Pro. 50(c). The alternative new trial motion is tested by the same standards that would apply if the motion were made independently under Rule 59. 9A Wright & Miller § 2539, at pp. 360-61.

Courts have the inherent authority pursuant to Rule 59 to set aside verdicts in order to prevent a miscarriage of justice. *Allred v. Maersk Line, Ltd.*, 826 F. Supp. 965, 969 (E.D. Va. 1993) (citing *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 892 (4th Cir. 1980), *aff'd in part, rev'd in part on other grounds*, 35 F.3d 139 (4th Cir. 1994). Though the underlying basis for a new trial is always "to prevent injustice," there are several general grounds for a new trial, including prejudicial error of law on the part of the court, a verdict which is against the weight of the evidence, damages awarded

which are too large or too small, or some palpable misconduct which has prejudicially affected the jury. *Allred*, 826 F. Supp. at 969 (citing 11 Wright & Miller § 2805). This list is not exhaustive, and a new trial in certain circumstances also may be granted on the ground that the jury rendered verdicts which are inconsistent. *See, e.g., Fox v. Dynamark Security Centers, Inc.*, 1989 WL 106802 (4th Cir.. 1989) (unpublished opinion); *Warner v. Upjohn Company, Inc.*, 628 F.2d 848 (4th Cir. 1980).

**B. RENEWED MOTION FOR JUDGMENT**

Defendant Russell has renewed his motion for judgment, arguing that, as a matter of law, he is entitled to qualified immunity. The court agrees, although for different reasons than those advanced by Defendant. The doctrine of qualified immunity shields public officials performing discretionary functions from personal liability under certain circumstances. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 818). An official's claim of qualified immunity will be defeated if, "in the light of preemption-existing law" the unlawfulness of his conduct was "apparent." *Anderson*, 483 U.S. at 640.

In general, police officers on the street are entitled to rely on police department policy and the official training they receive from the department. *See, e.g., Dodd v. City of Norwich*, 827 F.2d 1, 4 (2d Cir. 1987)

(instructing the district court to consider whether the individual police officer "is entitled to a qualified good faith immunity based on his following the policy and training of the police department"), *cert. denied*, 484 U.S. 1007 (1988); *cf. Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (holding that officers implementing a long-standing policy on utilizing police dogs are entitled to qualified immunity where no then-existing case law demonstrated that the particular policy was unconstitutional), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (holding that if town officers were simply implementing an established policy of the town, then they would have available to them a defense of qualified immunity from personal liability, provided they can establish objective good faith in relying on the town's policy); *cf. also, Chew*, 27 F.3d at 1459 n.17 (Norris, J., concurring) (noting that policymakers must be held to a stricter standard of accountability than officers forced to make snap judgments on the streets; policymakers are entrusted with the weighty responsibility to study, analyze, draft, and implement an effective police policy that does not violate the Constitution). Where a policy or training program authorizes conduct which is patently violative of fundamental constitutional principles, an officer who follows that policy or training is not entitled to qualified immunity. *Cf. Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). Where, however, an officer acts pursuant to training that a reasonable officer could believe is constitutional, the officer should be shielded from personal liability. *Cf. id.*

In this case, Officer Russell was taught by the county that he was authorized to use deadly force

when he believed that his life or the lives of others were in danger, and that it was not necessary actually to see a weapon before employing deadly force. Officer Russell would have had no reason to doubt that it was constitutionally permissible to fire before actually identifying a weapon in the suspect's hand. The incident took place on December 28, 1991. At the time, it was well settled that a police officer is entitled to use deadly force in those situations where he has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985). It also had been established that an officer's use of force is to be scrutinized under a standard of objective reasonableness, with the reasonableness of the conduct judged from the perspective of a reasonable officer on the scene and at the moment when the decision to use the force was made. *See Graham v. Connor*, 490 U.S. 356, 396 (1989). In 1991, the Court of Appeals for the Fourth Circuit decided two cases in which it upheld the use of deadly force where the officer was unable to confirm the nature of the weapon or the extent of the threat before firing. *See Slattery v. Rizzo*, 939 F.3d 213 (4th Cir. 1991); *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991). The Fourth Circuit recently confirmed that the findings in favor of the police officers in *Greenidge* and *Slattery* were based on the reasonableness of their actions under the circumstances. *See Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996). In *Elliott*, the court states that "[I[n *Greenidge*, for example, we affirmed the judgment in favor of Officer Ruffin although Ruffin was unable to confirm the nature of the weapon before she used deadly force to protect herself." 99 F.3d at 642 (citation omitted). "In *Slattery*, we held that an officer reasonably felt threatened in a situation where he could no see the

suspected weapon at all. . . . We upheld Rizzo's use of force even though he could not confirm that the suspect was holding a weapon and even though it was not entirely clear that Slattery's movement was the beginning of an attack." *Id.* at 643 (citation omitted).

Given the state of the law at the time of the incident, the court concludes that Officer Russell has established objective good faith in relying on the "shoot/no-shoot" training he received from the police department, and the court finds that he acted in conformity with this training during the incident in question. Officer Russell therefore is entitled to qualified immunity, and judgment in his favor, on Plaintiff's excessive force claim against him.

**C. MOTION FOR NEW TRIAL**

Defendant Russell has move in the alternative for a new trial, on the ground that the jury rendered "inconsistent" verdicts. As mentioned above, it is necessary to rule conditionally on this alternative motion, because the court is granting Defendant's motion for judgment. Defendant Russel argued that the jury verdicts were inconsistent because the jury found that excessive force was used and that the Defendant was not entitled to qualified immunity, but failed to agree on a verdict on the state tort of assault and battery.

Defendant's argument fails for two reasons. First, the jury did not render a verdict that there was *not* an assault and battery; it simply was unable to reach an agreement on that claim. The jury was instructed that a finding of malice was necessary to liability on the state law claim, and the fact that the

malice question was posed separately may have generated some confusion as to how to answer the assault and battery question; the finding of no malice, however, in effect removed the need to answer the assault and battery question. In any event, this is not a case where the jury explicitly concluded that there was no harmful or offensive touching, as Defendant seems to suggest. Second, although the jury in effect found for Defendant on the assault and battery claim because they found that Defendant did not act with malice, an essential element of police officer liability under state law, this finding is not inherently inconsistent with a finding of excessive force and no qualified immunity. There is nothing inherently contradictory about a jury concluding that Plaintiff did not meet his burden of showing that the officer acted with malice, and at the same time, concluding that Defendant did not meet his burden of proving that he acted in good faith. In sum, the court does not believe that the verdicts rendered by the jury in this case were of the irreconcilable, inherently inconsistent sort which would necessitate the granting of a new trial. Defendant Russell's motion for a new trial therefore will be denied.

## III. CONCLUSION

For the foregoing reasons, Defendant Russell's motion for judgment is GRANTED, and judgment will be entered in his favor on Plaintiff's excessive force claim against him. Defendant Russell's alternative motion for a new trial is DENIED. Because Plaintiff therefore did not prevail on his claims against Officer Russell, his present motion for attorneys' fees is DENIED. Plaintiff is now free, however, to pursue his

claims against Prince George's County and Police Chief David Mitchell in his official capacity, if he so desires.

A separate order will be entered.

/s/ _____

DEBORAH K. CHASANOW
United States District Judge

Supreme Court, U.S.
FILED
JUL 27 2001
OFFICE OF THE CLERK

NO. 01-1933

IN THE
# Supreme Court of the United States

**MAJOR MAURICE ANDERSON**
Petitioner
v.

**DAVID RUSSELL**
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## I. ARGUMENT

### A. This Case Does Not Meet The Criteria For Review By This Court

The United States Supreme Court has discretion to grant a writ of certiorari when it concludes that "compelling reasons" exist to warrant review. Rules of the Supreme Court of the United States, Rule 10. The Petitioner essentially contends that this case falls within the reasons enumerated in subsection (a) which states that:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. . .

The rule further notes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Anderson's sole argument is that the Fourth Circuit made erroneous application of the facts and in doing so "has so far departed from the accepted and usual course of judicial proceedings" that this Court should grant certiorari. The Fourth Circuit decision is not in conflict with either the decision of another United States court of appeals or a decision by a state court of last resort, indeed, the law on the

issue of constitutional violations is clear. However, as noted by the Court in *Saucier v. Katz*, ___ U.S. ___, ___, 121 S.Ct 2151, 2158 (2001), "*Graham*[1] does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." The Petitioner merely disagrees with the Fourth Circuit's application of the facts in this specific case to that test.

**B. The Fourth Circuit did not err in its application of facts based upon consideration of all of the evidence presented**

The Petitioner claims that the Fourth Circuit ignored alternative evidence and elected to believe the Respondent regarding two significant issues: the existence of a bulge near Anderson's waist (which could have been a weapon), and; whether he reached for the area of the bulge. Petition at p. 17. Neither of these facts were seriously disputed by the Petitioner during the trial and there is not more than a scintilla of evidence contradicting either.

The Court must determine whether there was legally sufficient evidence to support a verdict in favor of Anderson when considering Officer Russell's judgment as a matter of law. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150, 120 S.Ct. 2097, 2110 (2000). The inquiry is identical to that considering motions for summary judgment. *Id.* "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250, 106 S.Ct 2505, 2511 (1986). A reviewing court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that

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[1] *Graham v. Connor*, 490 U.S. 386, 109 S.Ct 1865 (1989).

one party must prevail as a matter of law." *Id.* at 251-2, S.Ct at 2512.

The evidence showed that on December 28, 1991, David Russell, a sworn police officer with the Prince George's County Police Department (JA 166), was working part-time at Prince George's Plaza (JA 166) with PO David Pearson. JA 216, 483. The officers were in police uniforms (JA 209-10, 282) at that time and Officer Russell received a report of an individual armed with a handgun from a patron of the plaza. JA 210-11. The patron identified Major Maurice Anderson as the individual with a handgun by pointing to him. JA 210-11. Officer Russell observed Anderson for a period of time noticing that this individual had a bulge in his left side consistent with a handgun. JA 174, 211-12.

Anderson was approached by both officers with their handguns drawn (JA 215, 498-99), ordered to drop some money in his hand (JA 183, 214-16) and raise his hands. JA 216, 501-03. He dropped the money (JA 183, 216, 283) and initially complied with the orders to raise his hands but he lowered them again and then he was ordered to get on his knees. JA 183-84, 216, 283, 501-03. He did not fully raise his hands despite three or four commands to do so. JA 216-18, 501-03. Further, despite repeated commands to keep his hands up and visible to the officers, Anderson reached inside the left portion of his jacket (in the area of the bulge) where Officer Russell could not see his hand. JA 185, 217-18, 466-69, 477. He states that he had a radio in his left back pocket and an eyeglass case with shoe polish inside his belt and covered by his jacket on his left side. JA 279-80. Anderson does admit to reaching with his left hand into his back pocket to turn off his radio. JA 255, 257, 283. Officer Russell felt certain that Anderson was trying to access the reported handgun and, fearing for his life, shot him. JA 217, 219-20.

The petition claims that the jury may have concluded that Officer Russell never observed any bulge in his waistband. This is disingenuous as Anderson admitted that he had an eyeglass case with shoe polish stuffed into it on his left belt area beneath his sweater. JA 279-80. For the jury to conclude that no such bulge existed, it would have had to reject the testimony of both of the parties and substitute a conclusion that was never presented.[2]

Anderson further suggests that the jury may have accorded little or no weight to the information given by the patron of the mall or found that the officer was unreasonable in believing this report. There is absolutely no evidence to discredit the officer's report of this conversation with the mall patron or his decision to accept the information provided and investigate. Officer Russell did not have to either believe or disbelieve this report but he did have the duty to investigate this possible serious criminal violation. There is not a scintilla of evidence to support Anderson's contention on this point and it is pure speculation that the jury totally ignored this uncontroverted information.

It is contended that the jury may have concluded that the officer never observed the Petitioner reach towards the bulge and, thus, was not entitled to use deadly force. The officer clearly testified that Anderson moved his hand to an area inside his clothes and near the bulge where the hand was not visable. JA 185, 217-18. Anderson agreed that he was reaching to turn off the radio in his back pocket at the time he was shot. JA 255, 257, 283. Officer Pearson stated that, while he didn't see any sudden movements, he wasn't watching the hands specifically but noticed that Anderson was continually moving his left hand up and down in his

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[2] While Officer Pearson stated that he did not observe a bulge, he indicated that he didn't have an opportunity to observe this area of the suspect's body. JA 489-90.

thigh towards his waistband area. JA 503-04, 511. Brian Small, the mall security manager, also observed that the Petitioner had his hand at his waist when the officer fired. JA 468. A witness, Larry Williams, initially testified that Anderson's hands were coming down at the time he was shot but that they never got below the Petitioner's shoulders. JA 152. He also testified that he was truthful when he indicated in a prior statement that Anderson's hands were below his shoulders at that time. JA 151-52, 158-59. He admitted that he was twenty to thirty feet from Anderson and that there was some obstruction from a little structure in the door. JA 146-47.

The evidence that Anderson was reaching towards his waist area is virtually uncontested. Anderson and Officer Russell, the actor and the person closest and in a position to directly observe this act, both agree that he was reaching into his jacket on his left side when he was shot. Selecting one of Williams' versions of the events, recognizing that it conflicts with his other testimony and is further weakened by a lack of opportunity to view the entire occurrence cannot amount to more than a mere scintilla. The evidence on this issue is so one-sided that the jury could not have reasonably reached an alternative conclusion--Anderson was reaching into his jacket in the area of the bulge at the time the shots were fired.

The petition continues to assert that the conduct of the Officer Russell prior to the confrontation should be considered as to whether he was acting as a reasonable police officer. Anderson complains that the officer: failed to obtain additional information from the mall patron; approached him improperly; should have ordered him to place his hands on the wall, and; should have sought the protection of a pillar if he feared for his life. Petition at pp. 18-19. This contention is specifically the type of second-guessing that this Court has sought to avoid in Fourth Amendment analysis.

The Court in *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct 1865, 1872 (1989), provided instruction that

> [t]he "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

The Petitioner contends that this officer made several missteps so that, at the moment Anderson's conduct gave him concern for his life or the lives of others, the jury could somehow discount Officer Russell's concern. The Fourth Circuit properly rejected this approach.

Under the circumstances facing the officers at the time of the occurrence, they had a reason to believe that Anderson was armed and the reaction to the uniformed officers' presence and commands gave Officer Russell a reasonable perception that his or the life of another person was in jeopardy. A reasonable officer under these circumstances would conclude that Anderson had a weapon and was attempting to access it. The second guessing of the approach or whether the officer could have jumped behind cover the moment he perceived a deadly threat is precisely what this Court in *Graham* cautioned against.

## II. CONCLUSION

For the reasons set forth above, the Respondent

respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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July 27, 2001